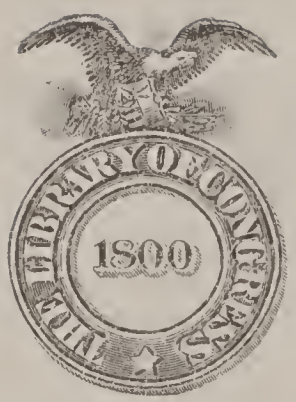

LETTERS

TO THE

CHAIRMAN OF THE JUDICIARY COMMITTEE OF THE HOUSE OF REPRESENTATIVES OF THE UNITED STATES,

FROM

JUDGE SPRAGUE

OF MASSACHUSETTS,

AND

MR. COMPTROLLER WHITTLESEY,

RESPECTING AN OFFICIAL STATEMENT BY THE LATTER, ANNEXED TO A REPORT OF THE JUDICIARY COMMITTEE.

BOSTON:
1852.
EASTBURN'S PRESS.

A great number of extra copies of the original Report having, upon motion of the Committee, been printed for circulation, it was hoped and expected that they would have caused an equal number of copies of the following correspondence to have been printed. The press of business in the House, as it is said, gave the Committee no opportunity to present their Report, and it cannot now be made until the next session. In the mean time it is hoped that this publication may, in some degree, disabuse the public mind.

Boston, Monday, March 8th, 1852.

To the Hon. J. X. McLanahan, *Chairman of the Committee on the Judiciary of the House of Representatives.*

Sir:

It was not until Saturday, the 6th inst., that I had any knowledge of the Report which was made by the Judiciary Committee to the House of Representatives on the 29th day of January last.

At the end of that Report is a statement made by Mr. Whittlesey, to which I wish to make an immediate reply. That statement relates to six bills of costs on Indictments in the District of Massachusetts, and it specifies and comments upon certain charges on six of those Indictments, three against one Crafts and three against one Wilson. Mr. Whittlesey, at the beginning, and again at the close of his statement, distinctly asserts that all those charges have been certified by the District Judge.

In this Mr. Whittlesey has made a very great mistake.

The fact is, I certified the charges in only one of those cases, and refused to allow them in each and all of the other five. And after such refusal I never heard one word respecting them, and had no idea that any of those charges in the five cases had been presented to the Department, until I read the Report of the Judiciary Committee on Saturday last.

To appreciate the importance of this mistake, it is to be observed that the gravamen of Mr. Whittlesey's allegations is, that there being several witnesses in jail who were brought up on each day during the trial of one of those indictments, the Judge has allowed to the late Marshal and the Clerk, fees for bringing up and returning those witnesses in each of the six cases, making those expenses six fold greater than they should have been. By means of his mistake, Mr. Whittlesey presents me as having multiplied those fees six times, when it is he himself who has made that multiplication, unintentionally no doubt, but still in a manner calculated to do an injury beyond estimate in money. I am confident that an inspection of the documents in his own office, and from which he made up his statement, will make the error manifest. By copies which have just been exhibited to me by Deputy Marshal Riley, and which he says were taken from those which he sent to Washington, it appears that there were six bills of costs, one of them a general bill embracing charges on ten Indictments, six of which were those above referred to. This bill contains the charges which I allowed, and at the foot of this are the names of four officers taxing and certifying the costs.

Each of the other five bills embraces charges on one Indictment only. These are the charges which I refused to allow. At the foot of each of these five bills are the signatures of three officers only. My name is not there, as it would have been if they had been certified by me. That there may be no mistake as to what Document I

signed, I send herewith a copy. It represents the condition in which the original was, when it left my hands, it not being connected in any manner, with any other paper. This copy is taken from one which was retained in the Clerk's office. There is no copy in that office of either of the other five bills of costs.

I pass to other points less important but still worthy of notice. There is another mistake into which Mr. Whittlesey has fallen. It is respecting the fees of the Clerk in those five bills, which acquire some significance by his being introduced as my son. Upon reading Mr. Whittlesey's statement every body is made to understand that all the costs therein mentioned have been presented to the Department for payment, including the Clerk's fees for all the precepts mentioned in the five cases. The Clerk is now absent on a distant voyage, by order of his Physician. I am assured by the Deputy Marshal who made out and transmitted the accounts, that they contain no such claim, but that those fees amounting to $393, are omitted. I am further assured that this will be shown by the documents now in the Department. The facts I believe to be these. When those charges in the five cases were rejected by me, the papers were taken back by the Marshal, and I heard no more of that claim. It seems, however, that he determined to appeal to the Department, and made an account, including his own fees, but as he was not requested to embrace the Clerk's fees in those cases, and had no interest to do so, he omitted them. With this account the Marshal sent as vouchers to sustain his claim, bills of costs, containing the charges

which I had refused to allow, embracing both Clerk's and Marshal's fees. Now this mistake of Mr. Whittlesey probably arose from his not having carefully compared the account which was presented for allowance and payment with the vouchers by which it was to be sustained, but having taken it for granted that all the items in the latter were embraced in the former. I would respectfully suggest that when a statement injurious to others is to be made to the Grand Inquest of the nation, by a public officer, founded on documents in his possession, it would be well that he should examine them until they are understood.

In the bill which I did certify, the fees of the Marshal are certainly very large and those of the District Attorney are very small, the latter being only $13.25 on each indictment. I did not think that I had any power to diminish the one or to increase the other. If I had, I certainly should have done so, and transferred largely from the Marshal to the District Attorney, whose services as counsel were well worth the whole amount allowed to the Marshal.

No objection has been suggested to the charges in the bill which I did certify; except that which may arise from the practice of bringing up and sending back prisoners as often as they are wanted in Court, whether as witnesses or defendants, by precepts from the Court; and which practice the committee disapprove. When I came into office in the year 1841, I found it to be the established practice of the Circuit Court, thus to bring up witnesses who were in jail in criminal cases, by a

writ of Habeas Corpus, and again to commit them by warrant. Mr. Justice Story was then upon the bench and had presided in that Court for about thirty years, during which time he had himself tried nearly all the criminal cases. The same course was pursued so long as he remained upon the bench, and was continued under his successor Mr. Justice Woodbury, till his lamented death in September last. My predecessor Judge Davis, universally esteemed as one of the best of Judges, had been in office forty years, and was cotemporary with Mr. Justice Cushing, the predecessor of Judge Story. The former Clerk of the Circuit and District Courts, states that he knows that this was the invariable practice during the time that he officiated which was from 1830 to 1845, and that he knew it to have been so while his predecessor was in office. I have reason to believe that such has been the practice ever since the organization of the government. However that may be, I found it established by a judicial tribunal to whose decisions, I, sitting in the District Court, an inferior jurisdiction, am bound to submit.

In the year 1842, concurrent jurisdiction in all cases not capital was given to the District Court. When it thus became my duty to exercise criminal jurisdiction in the District Court, I followed as of course the precedents and the practice which had thus been established by superior authority. When I inquired into the reason of this practice, I was informed that, being dependent upon the State for the use of her jails, the officers of the United States must use them upon such terms as her officers prescribed, and the jailor, being a State officer,

over whom the United States had no control, would not receive a prisoner into his custody, nor permit one to be taken out, except by virtue of a precept from the Court. And also that when an officer was to convey a prisoner for a distance of nearly a mile, it was deemed proper that he should have a precept to show his authority.

I am informed by the Clerk of the Municipal Court, in which all indictments under the State laws in the city of Boston except for capital offences are tried, that whenever a prisoner is to be brought from the jail for trial, or witnesses to testify, it has been the practice in that court for thirteen years past, to issue precepts to bring them up, and that this is done on each day that their presence is required; that there was an escape or rescue between the Jail and the Court House, upon which the Grand Jury made a presentment, condemning the practice of allowing an officer to take a prisoner through the streets of Boston, without a precept; that the Court ordered this presentment to be recorded, and thereupon adopted the practice of issuing precepts. Now I do not propose to go into any argument upon this subject, my purpose being to state facts as plainly and briefly as possible.

Under the practice as I found it established, the course was for the District Attorney to make application to the Clerk for such writs of Habeas Corpus, and warrants to commit, as he desired, and for the Clerk thereupon to issue them, the Attorney for the government being the officer whose duty it was to prepare and prosecute criminal cases, and to determine what witnesses were neces-

sary, and when they should be required to attend. To avoid the mistakes and irregularities which might arise from issuing such precepts upon a mere verbal application, I made a rule, that they should not issue, except upon a request in writing, signed by the District Attorney, and I am informed by the present Clerk, that for all the writs of Habeas Corpus, and warrants to commit, mentioned in those six cases, such written requests were made, and are now on file.

There is another thing which calls for observation. That it may be understood, I must premise that criminal prosecutions being conducted by the District Attorney, the costs are in the first place taxed by him, and his name is subscribed. They are then handed to the Clerk, who makes an examination, to see that they correspond with the records and files of Court, and then his name is affixed, after which they are submitted to the Judge for allowance. Mr. Lunt came into the office of District Attorney, just at the close of the trial, and his name is subscribed to these bills of costs, together with Mr. Rantoul's; thus, at the foot of each of the five is written:

"Taxed by R. Rantoul, Jr., Dist. Att'y.
George Lunt, Dist. Att'y.
Examined, S. E. Sprague, Clerk."

In the other, the names are the same, and to that only is subjoined,

"Allowed, Peleg Sprague, Judge."

Now Mr. Whittlesey begins by presenting what he states to be "an Abstract of costs taxed and certified by the District Judge and Clerk, in the District of Massachusetts," and in conclusion says, they were all "duly

certified by Judge Sprague and his son, the Clerk of the District Court."

He has thus held up the Judge and Clerk, as the only officers who have anything to do with taxing and certifying those costs, wholly omitting the District Attorney. No one would imagine that that officer had any concern with the matter, and thus in one case the responsibility which belongs to three officers is concentrated upon two, and in five cases, by suppressing one name, and supplying another, he has relieved from responsibility the officer who certified under his own hand, that he taxed the costs, and imposed it upon the Judge, who refused to allow them!

Having been compelled to introduce the name of the late District Attorney, it is due to him to state, that the case of Crafts, was one of very great importance and difficulty, requiring great labor in the previous preparation, and during the protracted trial, and that he performed his duty with great thoroughness and eminent ability, and taxed for himself in all the six cases, only the amount of $79.50.

I respectfully request, that this communication may be laid before the Committee on the Judiciary, and that they would be pleased to give it the same publicity, as they did Mr. Whittlesey's statement, and cause it in like manner to be placed among the printed documents of the House.

I have the Honor to be,
With great Respect,
Your Obedient Servant,
PELEG SPRAGUE.

TREASURY DEPARTMENT,

COMPTROLLER'S OFFICE,
April 8th, 1852.

HON. JAMES X. MCLANAHAN,

Chairman of the Judiciary Committee.

DEAR SIR:

Your favor of the 7th was duly received accompanied by a letter addressed to the Committee by the Hon. Peleg Sprague, District Judge of the United States for the District of Massachusetts.

Judge Sprague asserts I made a great mistake in saying, that certain bills of cost were approved by him.

To ascertain who is mistaken, it is necessary to examine the bills, and the manner they are connected together. The Caption of each bill is as follows: "Bill of Costs on Indictments, District Court, March Term 1849 including District Attorneys, Marshals, and Clerks fees."

The six bills, are on seven sheets of paper covered by another sheet, all of which are closely and firmly secured at the top at the left hand by a narrow ribbon, the ends of which are covered by a thick seal of wax, impressed by the letters, U. S. M. the initials used by the United States Marshal.

The caption of each is written at the top of the page, under which are drawn two lines in red ink.

The first line of each bill under its caption commences as follows, to wit:

"1849 No. U. S. by Indictment, vs."

The numbers are inserted in consecutive order from 1 to 6 inclusive.

Each bill under its appropriate caption and number, is added up, and the aggregate stated at the close of the bill.

The eight sheets thus secured, are folded in the usual form and endorsed "Bills of Costs, Indictments District Court, March Term 1849." Then follows in columns, the numbers, and the aggregate of the Marshal's fees in each bill set opposite to its appropriate number. These sums are added up, to make a total sum of $6235.50."

At the bottom of each of the five first bills, is written as follows to wit:

"Taxed by R. Rantoul, Jr., District Attorney.
" George Lunt, District Attorney.
"Examined S. E. Sprague, Clerk."

At the bottom of the 6th bill is written as follows:

"Taxed by George Lunt, District Attorney.
" R. Rantoul, Jr., District Attorney.
"Examined S. E. Sprague, Clerk.
"Allowed Peleg Sprague, Judge."

Judge Sprague says "The fact is, I certified the charges in only one of those cases, and refused to allow them in each, and all of the other five," and after such refusal, "I never heard one word respecting them, and had no idea, that any of the charges in the five, had ever been presented to the Department, until I read the report of the Judiciary Committee on Saturday last."

These bills were presented to the 1st Auditor who first examines Marshal's accounts when presented for settlement. His clerk on this branch of the public service, had no doubt the allowance of Judge Sprague at the bottom of the 6th Bill, was designed to, and did apply to all the bills that preceded it.

The clerk in this office who examined the account, a gentleman long experienced in this business and who

maintains a high character for intelligence and fidelity, did not suspect it was the intention of Judge Sprague to confine his allowance to the particular sheet of paper on which his name was written nor to the bill designated No. 6.

According to my recollection, and belief, I examined the allowance and signature of Judge Sprague, and supposed they referred to all the bills.

Mr. Seaman, Chief Clerk in the office, who while in the practice in his legal profession was accustomed to examine papers, and whose business in this office necessarily required him to examine numerous papers in manuscript: examined these bills to collect information, to be used in answering the calls of the Secretary of the Interior on this class of cases, without suspecting the allowance of Judge Sprague did not extend to all the bills mentioned. From the manner the bills are attached together, and endorsed, I cannot conceive of a different conclusion.

Judge Sprague was pleased to say: "Now Mr. Whittlesey begins by presenting, what he states to be, 'an abstract of costs taxed, and certified by the District Judge and Clerk in the District of Massachusetts, and in conclusion says they were all duly certified by Judge Sprague, and his son the Clerk of the District Court.'

He has thus held up the Judge and Clerk, as the only officers, who have anything to do with taxing, and certifying these costs, wholly omitting the District Attorneys."

The signatures of the District Attorneys were not mentioned by me in my communication to the Secretary of the Interior; because the law does not require them to certify the accounts, and therefore I did not recognize them as having anything to do, in verifying the legality and accuracy of the bills. It is the duty of the Judge to

examine the accounts of Marshals, District Attorneys and Clerks of the Courts of the United States, and if found correct to certify them—Statutes at large Vol. 1, page 277, Act of May 8, 1792.

It is the duty of the Clerk of the proper Court to certify the accounts of Marshals, District Attorneys and Clerks, in addition to the certificate of the Judge—Vol. 5, page 484, paragraph 167.

I entertain a high regard for Judge Sprague and he may rest assured, I should have mentioned the District Attorney, if the law had made it their duty to verify the accounts. The Judge and the Clerk therefore, "are the only officers who have anything to do with taxing and certifying these costs." I placed the responsibility where the law placed it, and any one aggrieved by it, should blame the law and not an officer who acts under it.

Judge Sprague is pleased to make the following assertion: "There is another mistake into which Mr. Whittlesey has fallen. It is respecting the fees of the Clerk in those five bills, which acquires some significance by his being introduced as my son. Upon reading Mr. Whittlesey's statement, every body is made to understand, that all the costs therein mentioned have been presented to the Department for payment, including the Clerk's fees, for all the precepts mentioned in the five cases. The Clerk is now absent on a distant voyage by order of his physician. I am assured by the Deputy Marshal who made out and transmitted the accounts, that they contain no such claim: but that those fees amounting to $393 are omitted. I am further assured that this will be shown by the documents, now in the Department."

Judge Sprague has been misinformed in this matter, as will appear by the following extracts, from the five bills mentioned by Judge Sprague:

Bill No. 1.

Clerk's fees.	Entry of Indictment, -	$5.00	
	57 Warrants to Commit,	57.00	
	55 Habeas Corpus, -	55.00	
	Recording, - - -	2.50	
	Taxing, - - -	1.50	
		——	$121.00

(Here follow similar extracts from the other four Bills, amounting to $121,—$64,—$66, and $66, respectively.)

Judge Sprague proceeds to say further:

"The facts I believe to be these. When those charges in the five cases were rejected by me, the papers were taken back by the Marshal, and I heard no more of that claim. It seems however, that he determined to appeal to the Department, and made an account including his own fees: but as he was not requested to embrace the Clerk's fees in those cases, and had no interest to do so, he omitted them. With this account the Marshal sent, as Vouchers, to sustain his claim, bills of cost containing both Clerks and Marshal's fees. Now this mistake of Mr. Whittlesey probably arose from his not having carefully compared the account which was presented for allowance and payment with the vouchers, by which it was to be sustained: but having taken it for granted, that all the items in the latter were embraced in the former."

In the last quotation Judge Sprague is in error in these particulars: 1st. In stating, that the Marshal did not embrace the Clerk's fees in the five cases mentioned. This error is proven by the extracts of the Clerk's fees from the five bills of the Marshal. 2nd. In stating that the Marshal sent on any vouchers to sustain the Clerk's fees.

The reverse of what Judge Sprague states is the fact.

The Marshal included the Clerk's fees in his own account, as is proven by the above extracts. He sent no voucher, other than the certificate of the Judge, and the Clerk.

When the Clerk's bill of fees is legal on its face, it is passed by the accounting officers, on the certificates of the Judge and Clerk.

The laws cited, require the account to be verified by their certificates; and only by theirs.

3rd. In stating that Mr. Whittlesey committed the mistake mentioned.

Immediately following the last quotation Judge Sprague says; "I would respectfully suggest, that when a statement injurious to others is to be made to the Grand Inquest of the Nation by a public officer, founded on documents in his possession, it would be well that he should examine them, until they are understood."

I shall leave it to the Committee and to the public to decide, whether, I merit the reproof.

When the account of the Marshal was examined containing the account of the Clerk, the Marshal was out of office, and not having obtained a receipt of the Clerk, it was not legal, either to credit the Marshal with the Clerk's fees, or to pay him the amount thereof in money. If Judge Sprague had endorsed his disallowance on the five bills mentioned, the accounting officers would not have been mislead by their union with the sixth bill.

In order to prevent any mistakes, as to what he did sign Judge Sprague sent a copy of the sixth bill to the Committee, and in respect of which he remarked: "It represents the condition in which the original was, when it left my hands, it not being connected in any manner with any other paper."

The five bills disallowed, must therefore have been connected with the sixth bill in the manner mentioned

above, after they were disallowed, and after Judge Sprague had allowed the sixth bill.

Whoever perpetrated the act did it, with the fraudulent intent to deceive the accounting officers, thereby to obtain money unlawfully from the Treasury for his own benefit, or for the benefit of others.

The letter of Judge Sprague is returned to you.

Most sincerely and respectfully yours,

ELISHA WHITTLESEY.

BOSTON, APRIL 17TH, 1852.

TO THE HON. J. X. MCLANAHAN,

Chairman of the Committee on the Judiciary of the House of Representatives.

SIR:

I have had the honor to receive yours of the fourteenth inst., accompanied by a copy of a letter to you from the Hon. Elisha Whittlesey.

In a former communication Mr. Whittlesey had asserted that six bills of costs therein mentioned had all been certified by the District Judge of Massachusetts. In my Reply this was denied and I distinctly stated that I had certified only one of those bills and refused to allow each and all of the other five. Here was an affirmative assertion on his part, and a denial on mine. Is his assertion true, or did he make a mistake, that is the question.

It now appears that the ground of his assertion was the supposition that when I affixed my signature to the

one bill it was connected with the other five in the manner he has described. This is his sole ground; he pretends to no other.

By my former communication it distinctly appeared that no such connection existed when I affixed my name. I sent a copy of the one which I signed, and stated that when it left my hands it was not in any manner connected with any other paper. This assertion Mr. Whittlesey had before him when he wrote his last letter. He knew from whom he received the Documents, and had the means, by inquiry, to learn when and by whom they were put together, and the present appearance was given. If he has done his duty he has made that inquiry. What is the result? No one has been found to gainsay my assertion; and Mr. Whittlesey himself does not controvert it. At the close of his letter he takes notice of it and then says,

"The five Bills disallowed must therefore have been connected with the sixth bill in the manner mentioned above, after they were disallowed, and after Judge Sprague had allowed the sixth bill. Whoever perpetrated the act did it, with the fraudulent intent to deceive the accounting officers, thereby to obtain money unlawfully from the Treasury for his own benefit, or for the benefit of others."

The sole reason for his belief that I had certified all the Bills is thus entirely taken away.

And now what does Mr. Whittlesey do? Does he say that by the deceptive acts of others he has been led into error, and thereby done injustice to a Judicial officer? Does he frankly admit the error and endeavor to redress the wrong? No! He insists that he made no mistake in asserting that I approved all the six bills.

He begins by saying,

"To ascertain who is mistaken it is necessary to ex-

amine the bills, and the manner they are connected together." He then describes the appearance which the Documents present connected as they now are, and then proceeds to discuss the question whether it is not to be inferred that my signature affixed to one bill, was intended to apply to the five which precede and are connected with it; arguing all along just as if it were conceded that the bills were so connected when my name was signed; and it is not until he comes to the very close of his letter, and after he has disposed of every other topic, that he notices the fact that they were not so connected.

If Mr. Whittlesey had admitted that his assertion was erroneous, and had entered into this discussion merely to exonerate himself from blame in being led into error, I should have no occasion to say one word in reply. I feel no desire to inculpate Mr. Whittlesey, but I mean to demonstrate that I, at least, am blameless.

Since my former communication, I have received, through the Hon. Mr. Appleton, what purports to be a fac simile of the Documents as they now exist in the Treasury Department. They are now before me. I reaffirm my former statement and distinctly declare that the one bill to which my signature is affixed, was not, when it left my hands, in any manner connected with either of the other five, that the first case in it began, as I believe, with the word and figure "No. 1," and that it had not upon it any word or figure indicating to me that it was to be connected with or had reference to any other paper whatever. I never heard of such connection till since I read the Report of the Judiciary Committee, and when I there saw Mr. Whittlesey's assertion that I had certified the six bills, it was with utter amazement, being wholly at a loss to understand how he could have fallen into

such a mistake. Bills of costs are never sent to Washington by the Judge or Clerk, but always by the Marshal.

I have made inquiry, and learn that after the one bill which I certified was taken from my presence, it was carried to the Marshal's office, and there, without the knowledge of the Judge or Clerk, the other five were joined to it and the whole connected and endorsed, and then sent to Washington by the Marshal, to sustain his account. Of this neither the late Marshal nor his Deputy, Mr. Riley, make any secret, but have freely declared it, and I have no doubt will do so to the Committee if inquired of.

If the Committee entertain any doubt upon this subject, I respectfully request that they would institute an investigation, and cause every person to be examined who can have any knowledge upon this subject.

I proceed to another topic. It relates to the Clerk's fees which were rejected. In my former communication I stated that Mr. Whittlesey had made a mistake in supposing that payment of those fees had been claimed at the Department, and explained how that mistake probably arose. I said that the Marshal made an account including his own, but did not include the Clerk's fees; and that with this account the Marshal sent, as vouchers to sustain it, bills of costs containing both Clerk's and Marshal's fees. I further said that Mr. Whittlesey's mistake probably arose from his not having carefully compared the account with the vouchers sent to sustain it, but having taken it for granted that all the items of the latter were embraced in the former. I thus expressly stated that those bills of costs did embrace the Clerk's fees, and that the account did not. How does Mr. Whittlesey meet this? It is by extracting, with all due formality and precision, from the bills of costs, the items of Clerk's fees which I said they contained, and then

gravely declaring that he had thereby proved that those Clerk's fees were embraced in the Marshal's account. He will not even now compare the account with the bills of costs sent to sustain it, but still persists in taking it for granted that all the items of the former are embraced in the latter. He seems even to confound the bills of costs with the account which I referred to. I must bring that account distinctly to view. I have obtained a copy from the Marshal's office. It begins,

"Dr. The United States in account current with I. O. "Barnes, Marshal of the United States for the District of "Massachusetts, Cr."

The debit side embraces every thing which the Marshal claimed to have allowed and paid to him. The only item which has any reference to those bills is in these words:

"Bills of costs on Indictments due Isaac O. Barnes, Marshal, $6235.50."

Now the aggregate of all those bills, that is, the fees of all the officers, amount to more than the sum thus claimed, while the Marshal's fees alone amount to precisely that sum; thus proving that the Clerk's fees were not included.

Further than this, I am assured that all that the Marshal claimed of those bills of costs was allowed to him by the Department: Mr. Whittlesey, in one part of his letter, says that the Clerk's fees could not be allowed, because the Marshal had no receipt from the Clerk. Just so. And for the same reason the Marshal did not claim them, knowing full well that he had no such receipt.

Further than this, the Marshal's account was made out

upon a printed blank, familiar to the accounting officers. One printed item on the debit side of the blank, is,

"To compensation of Clerk and Attorney."

Nothing is carried out against this, and the item itself is erased by drawing a pen through it, thus affirmatively apprising the accounting officers that Clerk's fees were not claimed.

For certainty, I herewith send a copy of the account.

I again affirm that those fees of the Clerk in the five cases were not embraced in the Marshal's account; and payment has never been requested either by the Clerk or any other person.

There is another point: The District Attorney taxed and signed all those bills of costs, and thus expressly assented to their being allowed. This fact was wholly omitted by Mr. Whittlesey when making an elaborate statement holding up the Judge to condemnation for having made a decision against the Government. He would now treat that omission as of no importance, because the statute does not require the certificate, that is, the assent of the Attorney. The law never requires the assent of the attorney of the party to be charged before a decision. But the Judge may and does require him to say whether he assent or not to a bill of costs; and if his assent be given, it is material as a ground of judicial action. That it is important, every one must see; how important, will be fully appreciated by those conversant with judicial proceedings.

By the established course of practice when a party is charged with costs, a Bill is taxed and if no objection be made, a judgment or decree for the amount is entered up, as of course, without the Judge looking at the bill, or in fact knowing anything of the items that go to make up the aggregate. This is done upon the assent

of the Attorney of the losing party, either express or implied. When objection is made, the Judge hears and rules upon it; but even then does not scrutinize any part not objected to.

Will it be said that it is dangerous to leave so much in the power of the Attorney? The same power exists and is constantly acted upon as to the whole subject matter of a suit however important.

A single act or omission of the Attorney may be decisive, as by admitting evidence on the one side, or not producing it on the other, or making a concession of facts fatal to his cause; and he may even make an agreement concluding the whole cause at once, and the Court may thereupon enter up judgment, without further inquiry. Nor are Government cases any exception. The District Attorney possesses and exercises the same power, and the Court upon his assent alone may make a decision or decree affecting the United States to the amount of hundreds of thousands, or millions of dollars.

The assent justifies the Judge, and to suppress that fact when arraigning his conduct would be doing great injustice. But I have no occasion to invoke the aid of any such practice or principle, because I did in fact look beyond the assent of the District Attorney, and seeing an error of principle, rejected those fees in the five cases. In this I claim to have done at least my whole duty.

In conclusion permit me to say that the Committee having received an official statement from a public officer of high reputation, and reposing as they had a right to do, entire confidence in its correctness, caused it to be published by the authority of the House of Representatives, and sent as a public Document, in the most imposing form, to all parts of the United States. The errors of that Statement have now been demonstrated, and it is shown to be as unjust as it is injurious to me and to the

Judiciary. It has made its impression upon thousands whom my voice can never reach.

I respectfully ask of the Committee to take the most effectual means to redress the wrong that has thus been done, and arrest the mischief which is even now deepening and extending.

I have the Honor to be,
With great respect,
Your obedient servant,
PELEG SPRAGUE.

TREASURY DEPARTMENT,

COMPTROLLER'S OFFICE,
6th May, 1852.

HON. J. X. MCLANAHAN,

Chairman of the Judiciary Committee.

DEAR SIR:

The letter Judge Sprague addressed to you on the 17th ult., which was placed in my hands by your kindness is returned.

I shall not imitate the spirit or tone of Judge Sprague's remarks. If the facts disclosed in his letter of the 8th March, had been known to me, when I reported on various subjects to the Hon. A. H. H. Stuart, Secretary of the Interior, on the 26th November last, the Certificate of Judge Sprague would not have been deemed to extend to the first accounts in the package presented by

Mr. Barnes, the late Marshal for settlement. I acted in the matter from the evidence before me, and no one has examined this package, to my knowledge, who has not come to the same conclusion that the Accounting Officers and their Clerks arrived at, to wit: that the Certificate of Judge Sprague extended to all the Accounts that preceded it. I contend if I came to the same conclusion that others have uniformly arrived at, having before them the same facts and evidence that were presented to me, I am not properly chargeable with having committed official mistakes. It seems to me, Judge Sprague is determined not to be satisfied unless I confess I have been to blame—I cannot gratify him, because the facts do not justify it.

In my communication to the Committee on the 8th ulto, I briefly described the Accounts and the manner they were connected and bound together, so as to form one paper or package. This was not to criminate or censure Judge Sprague, but to present the facts as they were derived from the Documents. Having so presented the facts, I proceeded to notice what Judge Sprague said. He stated in his letter to the Committee, that he certified only one paper or account, which was not connected with any other paper or account.

I did not controvert, nor doubt it, but placing the utmost reliance on his statement, I was led to assert a fraud had been perpetrated, by connecting the sixth bill with the five bills disallowed by Judge Sprague, and after such disallowances, with the intent to deceive the accounting officers and thereby to obtain money unlawfully. My intention was to do the most ample justice to Judge Sprague.

The Committee will see, however, on the 4th page of the letter under consideration, that he takes exception to my deferring the statement of the fact to the close of

my letter. It did not occur to me that it made any difference whether it was noticed at the beginning or end of my letter. It was inserted in that part of the letter which seemed to me to be the most pertinent and proper.

I invite the attention of the Committee to parts of Judge Sprague's letters of the 8th of March, and 17th of April, in which he speaks of the Clerk's fees. To pages four and five of the letter of March 8th where he says, "There is another mistake into which Mr. Whittlesey has "fallen. It is respecting the fees of the Clerk in those "five bills, which acquires some significance by his being "introduced as my son. Upon reading Mr. Whittlesey's "statement everybody is made to understand, that all "the Costs therein mentioned have been presented to the "Department for payment, including the Clerk's fees, for "all the precepts mentioned in the Five Cases. I am "assured by the Deputy Marshal who made out and "transmitted the Accounts, that they contain no such "claim, but that those fees, amounting to $393, are "omitted."

Judge Sprague seeks to make me responsible for the inference of the community, or for what, he says, is the inference of everybody. On the 26th of November, 1851, in obedience to the requirement of the Secretary of the Interior, I reported to him, in relation to the Accounts of the officers of the Federal Courts. In that report is this caption.

"Abstract of Costs taxed and certified by the District "Judge and Clerk in the District of Massachusetts." Printed Report No. 50, page 17, I then proceeded under that caption to present the amount of Marshal's Fees in six Criminal Cases, which was - - $6,147 55

I then stated that the Clerk's fees in the six cases amounted to $587 70, and that the Attorney's fees amounted to - - - - - - $79 50

I also stated I had written to the Clerk for information, and had not received a reply. The Report concluded as follows :

"The charges above referred to, appear in the account "of I. O. Barnes, late Marshal of Massachusetts, and "were all duly certified by Judge Sprague, and his son, "the Clerk of the District Court."

Taking the papers as they were presented to me, not doubting they all formed one Document or paper book, certified at the bottom of the last account, I submit to the Committee whether every word I said in relation to these Costs and to the Certificate of the Judge and Clerk is not true. Nothing was said about the Clerk having presented his account for payment. The true issue is, were the accounting Officers and their Clerks to blame for not detecting the fraud that was practiced in attaching the accounts together, and for not detecting the forgery committed in the erasure of figures, so as to make the accounts appear as one paper, and the Certificates of the Judge and Clerk apply to all that preceded them. Were the accounts now before me as they were on the 26th November last, without the knowledge of the facts since disclosed, I should make precisely the report I made then, I say, that no officer with reasonable and ordinary diligence would detect the fraud and forgery.

In his letter of the 17th of April, in regard to the Clerk's fees, Judge Sprague says, "I proceed to another topic; it relates to the Clerk's fees which were rejected. In my former communication I stated that Mr. Whittlesey had made a mistake in supposing that payment of those fees had been claimed at the Department, and explained how that mistake probably arose."

I do not find any allegation in his letter of the 8th March, that I supposed his son had claimed payment of his fees. In that letter, he averred, the public drew that

inference, but he did not say I drew it or supposed it to be the case. No person acquainted with the manner of settling those accounts would come to that conclusion, without the receipt of the Clerk was presented by the Marshal, or he had made a personal demand for payment. This I say however, as I did in my former letter, that if the Clerk had demanded his fees I should have paid them, not doubting that both the Certificate of the Judge and the Clerk covered them. I should not have paid them to Mr. Barnes, because he was out of office, and it would not have been legal to have advanced him money. In order to raise a new issue and to divert the public mind from the one formed by my report of the 26th November, Judge Sprague accompanies his letter of the 17th ultimo, with the copy of an account current, which Marshal Barnes presented, which included his own fees only. Being out of office, he could not include any other fees, unless he had paid them.

Judge Sprague did not certify that account current nor does the law require him to certify it. That is not the account mentioned in the statute which requires his Certificate, but it is the account which contains the costs stated in detail. In that account the costs of the Clerk are taxed and certified, if the paper is not vitiated by fraud or forgery.

That there may be no misunderstanding or mistake in this matter, I send to the Committee the original accounts as attached together, and a copy for the use of the Committee, as the original must remain on file. The Committee will see that no Certificate to the account current was made nor alleged to have been made, and that the copy of the Account Current has nothing to do in the case. From the evidence produced the account of Marshal Barnes would have been settled without an account current, and so would the account of the Clerk. Neither

the claim of the Marshal nor the Clerk, could have been settled unless the accounting officers had fully believed the Certificate of Judge Sprague covered them which was at the bottom of the sixth account as the accounts were connected together.

I invite the attention of the Committee to what Judge Sprague says on pages 10 and 11 of his letter of the 17th April as to the manner of taxing costs. "By the established course of practice when a party is charged with costs, a bill is taxed, and if no objection be made, a judgment or decree for the amount is entered up as of course, without the Judge looking at the bill, or in fact knowing anything of the items that go to make up the aggregate. This is done upon the assent of the attorney of the losing party, either express or implied. Where objection is made, the Judge hears and rules upon it; but even then, does not scrutinize any part not objected to."

This is a very important disclosure put upon record, where it should be, and should remain there, so long as it is contended by these officers or Judges, that the certificate of the Judge is conclusive upon the accounting officers.

It appears then, that Judge Sprague adopts the practice in private suits to those that are prosecuted by the United States.

In private suits there are opposing counsel who are watchful and vigilant to guard the interests of their clients. The counsel receive but a small part, if any, of their compensation by the fees that are taxed, but by an agreement, or on the principle of a *quantum meruit*. The closer they scrutinize the bill of costs, the more they commend themselves to their clients, and lay the foundation for increased compensation.

But it is entirely different in suits prosecuted by the United States. The District Attorney receives his com-

pensation by his fees principally. He is the person to object if costs are taxed too high. The costs are taxed by the Clerk for the benefit of himself, the Marshal and District Attorney. And according to Judge Sprague's practice it makes no difference with him, as to the amount; if these officers have no compunctions of conscience he signs the accounts as they present them, and the Judge with some triumph asks the question "will it be said, that it is dangerous to leave so much in the power of the Attorney."

If the District Attorneys, are to take whatever money they choose from the Treasury, it would be best to have the power established by law, and to avoid partiality, the privilege should be extended to all honorable claimants.

I deeply regret to have innocently caused so much discussion by discharging what I supposed to have been my duty to the Secretary of the Interior and to the public.

The manner in which the public money is expended is a proper subject for investigation; but who ever attempts to correct extravagancies, or correct abuses, may rest assured he will be assailed.

Most respectfully,

And sincerely yours,

ELISHA WHITTLESEY.

BOSTON, JUNE 8TH, 1852.

To the HON. J. X. MCLANAHAN,

Chairman of the Judiciary Committee of the House of Representatives.

SIR:

I have this day received from the Hon. Mr. Appleton a copy of a letter to you from Mr. Whittlesey, bearing date the 6th of May.

There are three main points in discussion.

First. Mr. Whittlesey, in his original communication, asserted that I had certified six bills of costs therein mentioned. In my Reply I stated that in this Mr. Whittlesey was mistaken, and that I had certified but one of those bills. At the close of his next letter Mr. Whittlesey makes some remarks which, although not a direct and explicit withdrawal of the charge against me, might have been deemed an exoneration, if they had stood alone; but nearly three pages of that letter, and seven-eighths of all that he said upon this topic, were devoted to an argument to prove that he was not mistaken in asserting that I had certified the six bills, and that I was mistaken as to that fact. To this I made an answer. Mr. Whittlesey in his last letter unequivocally admits that I certified only one of those bills; but he seems to have great repugnance to the word mistake. I used it as the mildest term. I willingly drop it, and say only that the assertion that I certified those six bills is not true; and being now admitted to be untrue, I am content there to leave it.

Mr. Whittlesey seems to contend that the true issue is whether the accounting officers were to blame for being

misled by the appearance of the Documents. I have made no such issue, and have entered into no such discussion, but have gladly left to Mr. Whittlesey the full benefit of all he could say in that respect.

Second. In his first letter, Mr. Whittlesey in making a statement of charges which had been presented to the Department for allowance and payment embraced the Clerk's fees in the five rejected cases, and thus represented that those fees had been presented for payment. Five of those bills of costs had been rejected by me. It was important to show that the clerk had nothing to do with sending them to the Department, and that no claim for payment of his fees had been made. This it was my purpose to show, and in reply I contended that those fees had not been presented for payment, and I pointed out how Mr. Whittlesey's mistake arose. That after the five bills had been rejected, the Marshal made an account in which he embraced his own fees but not those of the Clerk: that with this account the Marshal sent, as vouchers to sustain his claim, those bills of costs, and that Mr. Whittlesey's mistake probably arose from his not having carefully compared the account with the vouchers. In his answer to this Mr. Whittlesey did not say that he had not intended to represent the Clerk's fees as having been presented for payment; but insisted that "the Marshal included the Clerk's fees in his own account," and to prove this, made an argument containing large extracts from bills of costs. In my reply to this I sent a copy of the account which I had described in my first letter. And this Mr. Whittlesey in his answer calls making a new issue! In order to understand that answer it is necessary to observe that bills of costs are there uniformly called accounts, although he had previously freely used the name "Bills of costs." This peculiarity in the use of terms being understood, it will be seen that

his last letter distinctly admits that those fees were not presented for payment. My object is attained, and I am in this respect content.

Third. All these bills of costs were taxed and certified by the District Attorney. This fact, apparent on the face of the Documents, Mr. Whittlesey wholly omitted in making his original statement. To this omission I took exception, as keeping out of view a fact which was material. In reply Mr. Whittlesey states as a reason for this omission, that the statute did not require the certificate of the District Attorney. In my answer I controverted the sufficiency of this reason and insisted that the fact was nevertheless important. Thus the question was on the validity of Mr. Whittlesey's excuse or justification. I should have been content to leave this without further remark, had not Mr. Whittlesey, in his last letter, introducing irrelevant matter, asserted that it is my practice in criminal cases to certify bills of costs without examination, upon the assent of the District Attorney. He rests this assertion entirely upon a passage in my letter in which I state the practice in civil cases. He quotes the passage. It will be observed that I there speak of the established practice when a party is charged with costs, and of a judgment or decree for the amount being entered up upon the assent of the attorney of the losing party. This description can apply only to civil actions. A judgment or decree for costs is never entered up in criminal cases. This was introduced argumentatively while maintaining the proposition that in criminal cases the assent of the District Attorney was of much importance. If such had been the established practice in criminal cases I should have so stated, for that would have been directly to the purpose; I should not have deemed the practice established without higher authority than mine; but civil cases could only be used

by way of argument from analogy. Mr. Whittlesey, in his last letter, not content with urging in reply that civil and criminal cases are not analogous, and that the practice in the former ought not to be deemed applicable to the latter, goes further and insists that I actually adopt that practice in criminal cases: pronounces that passage an "important disclosure," exults that it is now "on record," and afterwards says, "according to Judge Sprague's practice it makes no difference with him as to the amount. If these officers," (the District Attorney and Clerk,) "have no compunctions of conscience, he signs the account," i. e. Bills of costs, "as they present them." Suppose that while contending that parents should have power over their children, I should say that in some countries they exercise the power of life and death; and thereupon Mr. Whittlesey, instead of merely saying that it is no rule for us, should assert that Judge Sprague actually exercises that power. Mr. Whittlesey's logic would have been sufficiently bold even if my letter had stopped where his extract stops: but it does not. After a few other cases put argumentatively it proceeds thus:—

"But I have no occasion to invoke the aid of any such practice or principle, because I did in fact look beyond the assent of the District Attorney, and, seeing an error of principle, rejected those fees in the five cases."

This is the only statement I made as to what I had practically done; and yet with this statement before him, and in the face of five bills of costs, which I had actually rejected, although taxed and certified by the District Attorney, Mr. Whittlesey asserts that it is my practice to certify bills of costs without examination, upon the assent of the District Attorney.

To end this collateral matter at once, I now say such is not my practice and has never been. I examine every

bill of cost after it has been taxed and certified by the District Attorney. This is known to every District Attorney, and every Marshal, and every Clerk, whether of the Circuit or District Court, who has officiated at any time while I have been in office.

I abstain from remarking further upon irrelevant matters, and the spirit in which they are introduced, and return to the true issue. Bills of costs are to be certified by the Court, or one of the Judges. They contain matters of which the Judges have no personal knowledge. They are not Attorneys for the Government, and they call upon the officer who conducted the prosecution, and who is bound to protect the Government against improper charges, and they attach importance to his certificate. In judging of their conduct in allowing a bill of costs, the fact that the District Attorney, upon his official responsibility, has certified it to be correct, is material, and to keep that fact out of view when making a statement of the case, holding up the Judge to censure, is doing injustice. The effect in the cases we have been discussing is such as I described in my first letter.

At the close of this letter Mr. Whittlesey seems to appeal to the sympathy of the Committee. The first Comptroller of the Treasury made an official statement which has been sent as a public document to all parts of the United States. That statement contained errors of fact, and did great injustice to a judicial officer. That officer, in self vindication, has pointed out the errors and made the injustice manifest. Is this indeed a hard case for the Comptroller?

I respectfully repeat the requests made at the close of my former communications, and ask that the Committee would be pleased to give to this letter and the whole correspondence, the same publicity that was given to

Mr. Whittlesey's first communication, and cause them to be placed in like manner among the printed Documents of the House.

I have the Honor to be,

With great respect,

Your obedient servant,

PELEG SPRAGUE.

Note 1. Some persons have understood by the Report that a separate precept was issued for each witness. Such was not the fact, nor does Mr. Whittlesey so represent it, but that the six witnesses were put into one precept in each case.

Note 2. Since the foregoing correspondence, a material fact has been stated in the affidavits of Patrick Riley and Frederick Warren, made on the 16th of June last, which is that those six bills of costs were never duly certified by the Clerk as required by statute: and it is admitted in a letter from Mr. Whittlesey to the Honorable Wm. Appleton, dated the second day of August, that the only certificate made by the Clerk, was by writing the word "Examined" and subscribing his name at the foot of each bill, as set forth in the first Reply. That was the certificate required by the Judge prior to the Act of 1842. It imported that the Clerk had examined and found the bill to agree with the Records and Files of the Court. By the Statute of 1842, it

was required that in addition to the certificates then required by law, the Clerk should certify "that the services have been rendered, and the supplies furnished for and used by the Court, and that the charges therefor were legal and proper."

It is stated by the officers above mentioned, that ever since the Act of 1842, all the claims of the Marshal, including as well bills of Costs, having upon them the certificate by the word "Examined," as other claims, have invariably been accompanied by a certificate in the terms specified in that Act, and prescribed in printed forms furnished by the Department; and as to charges in criminal prosecutions, that certificate was in the following words;

"I ———— Clerk of the above mentioned Court hereby certify that I have examined the within abstract and the vouchers therein referred to, and that in my opinion the services have been rendered as therein charged, and the charges therefor are legal and proper:" and that in every instance except that of the six bills referred to, when bills of costs have been sent to the Department, they have been accompanied by other charges in criminal prosecutions, and the whole covered by a certificate in the above form.

It thus appears that not one of those six bills was duly and legally certified by the Clerk. This doubtless arose from the Clerk's having refused to make the usual certificate after the decision of the Judge, or from his not having been requested to do so.

The result is,

1st. That the assertion in Mr. Whittlesey's original Report, that the Judge had duly certified the six bills of costs, is not true.

2d. That the representation that the Clerk's fees in

the five bills have been presented for allowance and payment, is not true.

3d. That the District Attorney did tax and certify all those bills of costs, he having caused all the charges and made written requisitions upon the Clerk for every precept that was issued, and yet his name is kept out of view in regard to the taxation of costs.

And from the facts above set forth it now seems,

4th. That the assertion that those six bills were duly certified by the Clerk, is not true.

What reputation is safe when such errors are found in an official Document, under the hand of the first Comptroller of the Treasury, and intended for the information of Congress and the people.

P. S.

Boston, September 4th, 1852.